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July 15, 2021

VIA CERTIFIED MAIL/RETURN RECEIPT
REQUESTED AND VIA E-MAIL

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Idaho Department of Lands
Attn: Mr. Eric Wilson
Resource Protection and Assistance
Bureau Chief
300 N. Sixth Street, Suite 103
P.O. Box 83720
Boise, ID 83720-0050

Idaho Department of Lands
Attn: Mr. Mike Ahmer
Resource Supervisor-Lands
and Waterways
3258 W. Industrial Loop
Coeur d'Alene, ID 83815

Re: State of Idaho Lease No. B220168 (North Idaho Maritime, LLC)
Request for Reconsideration

Dear Messrs Wilson and Ahmer:

I represent North Idaho Maritime, LLC ("NIM"). The Company is in receipt of Mr. Wilson's June 23 transmittal letter along with the enclosed June 11, 2021 Memorandum from Mr. Wilson to Director Miller and the proposed "Submerged Lands Lease" (Lease No. B220168). Pursuant to IDAPA 20.03.17.030.06, please let this letter serve as a request for reconsideration.

This letter represents a preliminary statement of bases for reconsideration and is not intended to be exhaustive. NIM requests the opportunity to provide supplemental materials and argument in support of this request.

The process leading up to the Department's June 23, 2021 letter and enclosures has been long and protracted. While various information and positions were gathered in the context of prior hearings, extending back to 2008, the consideration of that information for purposes of preparing the present Lease has led to numerous errors of fact and law. Set forth below is an initial identification of some of those issues.

1.

The Memorandum of June 11, 2021 forming the basis for the proposed Lease contains erroneous findings of fact. As you are aware, an encroachment permit was previously issued to Murphy Marine Construction Company authorizing storage and a work area similar to that requested by NIM. Both entities have made use of portions of Cougar Bay for years, as you well know. However, many of the acts which IDL's June 11, 2021 Memorandum attribute to NIM were actually acts undertaken or performed by Murphy.

By way of example, the June 11 Memorandum identifies "the infamous Hooligan Island" as having been stored by NIM in Cougar Bay since 2017. This is not true. NIM has never had anything to do with the storage of Hooligan Island. This was apparently stored by Murphy, and Murphy's acts have now been attributed to NIM.

Information in the record was cited for the proposition that NIM has constructed improvements by adding pilings in Cougar Bay without authorization. This is not true. NIM has only used existing piling systems that have remained since Cougar Bay was used for log storage in a far more intensive manner than NIM's use.

It was also determined, as part of the Memorandum and the proposed Lease, that NIM has been occupying five (5) acres of Cougar Bay without authorization. This is not true. What has apparently happened is that the uses made by Murphy have been included in the uses attributed to NIM. There is no distinction made in the findings and certain of the photographs included in Exhibit 5 show uses made by Murphy and not by NIM. At no point in time has NIM used five (5) acres of storage space in Cougar Bay. We can only conclude that some of Murphy's use has been attributed incorrectly to NIM.

2.

Based upon the procedural history leading to Lease No. B220168, IDL has now created a scenario where one maritime business (Murphy) is permitted to store docks and work in a designated portion of Cougar Bay in a manner more intensive than proposed by NIM. This was accomplished through the issuance of an encroachment permit that authorized encroachments under the encroachment permit regime, for the benefit of Murphy, well beyond the line of navigability. It was suggested that Murphy's permit was proper because Murphy owned littoral land. Yet littoral rights only extend to the line of navigability, and this has created a scenario where, under the purported auspices of an encroachment permit, Murphy is now authorized to conduct activities more extensive than those requested by NIM.

IDL has stated in its Memorandum that issues of aesthetics are promoted by limiting NIM's proposed dock storage from October 1 through May 31 and by negating any ability on the part of NIM to perform *de minimis* work activity year-round in a defined area so as to provide safe harbor

July 15, 2021

Page 3

for NIM. Yet these very same ostensible aesthetics are not being promoted by Murphy as it acts under the auspices of an encroachment permit that appears to confer rights beyond the line of navigability and that is not allowed at law.

3.

NIM requested approval to lease five (5) acres of submerged lakebed. Yet NIM has never used five (5) acres to date. IDL's contrary finding must, by necessity, be predicated upon an attribution of Murphy's use to NIM. This is improper.

The problem is exacerbated by IDL's unilateral determination of a retroactive annual Lease rate of One Thousand Dollars (\$1,000) per acre for a total of Five Thousand Dollars (\$5,000) per year. Yet, as noted, NIM never used five (5) acres. Moreover, in discussions with IDL staff, during the very same timeframe, the only Lease rate proposed was One Hundred Dollars (\$100) per year.

With all due respect, there is no statutory authorization to impose a retroactive Lease payment under these circumstances when (a) the payment is based upon a per acre charge in excess of that represented by staff; (b) the payment is based upon acreage not actually used; and (c) no such payment is being required of Murphy even though Murphy is effectively utilizing more lakebed under an encroachment permit which extends beyond the line of navigability and that should, for equal treatment, be similarly administered under the submerged lands lease regime.

4.

There are considerations unique to Cougar Bay which appear to have been overlooked or inadequately considered. It is unfortunate that many people do not fully understand, appreciate, or consider historic attributes specific to Cougar Bay. Having been a life-long resident of North Idaho, and having litigated cases involving historic attributes of Cougar Bay to the Idaho Supreme Court, I am well-acquainted with the same.

Cougar Bay is a shallow bay even when water is maintained at the summer level of elevation of 2128. Although IDL often does not wish to acknowledge the same, prior to the installation of the Washington Water Power dam in 1905, Cougar Bay was operated as a dairy farm by Messrs. Graham and Healy. That is why Clayton Miller, who laid out the original Government Land Office (GLO) meander line in 1891, walked along the shore at elevation 2121+/-: Based on that Government meander line, Government lots and quarter sections were created under present-day Cougar Bay water levels at 2128. These private property owners continue to pay property tax on the submerged lands and have done so for decades.

Given these considerations, that is why Cougar Bay was used for log storage for decades. These uses were far more intensive and extensive than those proposed by NIM. You can see as much from the photographs included in the materials appended to your June 23 Memorandum. NIM didn't

put these pilings in. They are remnants of prior decades of log storage.

In fact, not too long ago, Kootenai County proposed to remove the logs from Cougar Bay. That resulted in legal proceedings in which Scott Reed and I were co-counsel. As a result of those legal proceedings, Kootenai County determined not to proceed with the removal of the pilings in Cougar Bay. The reasons for the continued presence of the pilings include an ability to provide safe harbor and traditional uses (such as those now authorized for Murphy and for which NIM seeks authorization). The purpose of keeping the piling structures in place was also to impede the use of the area by intensively motorized watercraft including wake boats, and to provide recreational opportunities for fishing and duck hunting. Over the years, the possible intensification of use of Cougar Bay has been mitigated from the log storage days to the present, including through the activity of NIM and Murphy.

It was suggested in your Memorandum that NIM's business model is flawed to the extent that it is predicated upon the use of a *de minimis* portion of Cougar Bay for log storage and a small and safe work area. We respectfully disagree. NIM has not permitted well over 3,000 encroachments on Lake Coeur d'Alene. Those encroachments were permitted by IDL. Those encroachments need to be maintained and constructed in an appropriate and safe manner. It is simply unrealistic for IDL to permit encroachments in well-traveled areas of the Lake and to expect that NIM or any other maritime business can safely construct the same given the proliferation of marine activity and excessive wakes. The only party that can benefit from the use of Cougar Bay for traditional purposes such as those requested is Murphy Maritime under an apparently incorrectly-issued encroachment permit that extends beyond the line of navigability.

The collateral benefits of NIM's and Murphy's uses are the added protection of Cougar Bay for the purposes of recreational opportunities in the form of kayaks, canoes, fishing, and duck hunting. Some people would apparently like to see all pilings and use of Cougar Bay removed for their aesthetic personal benefit. And where will that lead us? Wake boats churning-up a shallow and sensitive area where kayaks and canoes can no longer operate safely and where dock builders can no longer safely construct, maintain, and store the docks that IDL has permitted and continues to permit.

5.

IDL discussed the issue of aesthetics and noted that several commenters own property overlooking Cougar Bay "expressed strong concern about the impact of dock storage on the aesthetic component of the public trust doctrine." This underscores yet another manifestation of recent growth and people buying property without fully-analyzing the nature and extent of what goes on around them. Cougar Bay has been used for the purposes described above for the better part of a century. Someone moves to town, buys a lot on a hill a half mile away, moves into their house, and looks at Cougar Bay and wonders why it is used for storage or other marine activities. They then seek to terminate those activities for their personal aesthetic reasons without an adequate balancing of the

July 15, 2021

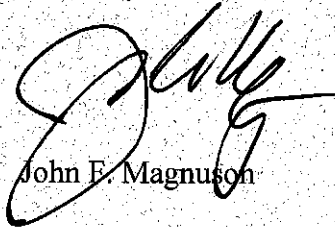
Page 5

factors discussed above. If docks can't be stored, maintained and built in the manner requested, by NIM, then IDL will be effectively conferring a potential monopoly on another maritime business who purports to act under the auspices of an encroachment permit instead of a submerged lands lease. NIM does not wish to cause problems for Murphy. However, both entities are long-standing maritime businesses and one should not be allowed to operate under a different standard of rules than the other. That is fundamentally inconsistent with public trust considerations.

Please consider the foregoing in support of NIM's request for reconsideration. We also request the ability to supplement these reasons and authorities in a more detailed manner to facilitate a meaningful resolution of these issues through reconsideration and related processes.

Thank you.

Sincerely,



John F. Magnuson

JFM/js

VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

cc: Idaho Department of Lands
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